

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALI WARSAME**

Claimant

VS.

**TYSON FRESH MEATS**

Self-Insured Respondent

)  
)  
)  
)  
)  
)

Docket No. 1,050,779

**ORDER**

Claimant requested review of the April 12, 2013, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on July 26, 2013.

**APPEARANCES**

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Carolyn McCarthy, of Kansas City, Missouri, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge found claimant met with personal injury by accident arising out of and in the course of his employment with respondent on January 12, 2009. The ALJ went on to find claimant suffered a 0 percent permanent partial functional impairment for his injury and was entitled to no permanent partial general (work) disability. Claimant was awarded unauthorized medical expense not to exceed \$500.00, but was denied entitlement to future medical treatment based upon the lack of any permanent injury or disability award.

Claimant appeals arguing that it is clear he suffered an injury by accident and that accident occurred at his place of employment. Claimant contends he is entitled to a 21 percent functional impairment to the body as a whole and a 100 percent permanent partial

general (work) disability. Claimant requests that his right to future medical treatment and the right to review and modify the Award be left open.

Respondent argues that there is nothing to support claimant's contention that he was injured at work and therefore his claim should be denied. In the alternative, should it be found claimant did suffer an accidental injury, the evidence supports a finding that claimant suffered no permanent damage from the injury and should be denied a permanent impairment and/or disability award.

The issues on appeal are:

1. Did claimant suffer an accidental injury, and, if so, did it occur in respondent's workplace?
2. What is the nature and extent of claimant's injuries and disability?
3. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

Claimant is Somalian and cannot read or write any language and does not speak English. He began working for respondent in February 2006 in packaging. Claimant was transferred in 2007 to a job which required working with knives and hooks. He was working with 60 pound pieces of meat. Claimant continued in this position until January 2009.

Claimant testified that in 2009 he began to feel pain and discomfort in his shoulders and neck from reaching and pulling pieces of meat off a belt and onto a table. There came a time when claimant needed medical attention and he went to the nursing station. He had his shoulders rubbed and was given ibuprofen for pain. Two months later claimant was sent to a doctor, who had claimant moved to another job and also referred him for physical therapy. After three months of treatment, claimant was released to full duty. He continued to complain of problems with his neck, shoulder, arms and left hand. Claimant also received treatment with Michael J. Baughman, M.D., for a left hand injury, which is the subject of another claim with respondent. That claim has been settled and will not be further discussed herein.

Claimant testified that because of his neck pain, he is unable to sleep on a pillow and has problems bending his neck up and down and side to side. His pain level is a 5 out of 10. Claimant's shoulder pain is in the back of his shoulders, extending from the neck toward the end of each shoulder and down his arms into his left hand. His neck and shoulder pain occurs everyday. He has popping in his shoulders and rated the shoulder pain at a 6 out of 10.

Claimant's employment was terminated September 2011. He drew unemployment from September 2011 until September 2012. He has seen no improvement in his pain since he stopped working for respondent.

Claimant met with Terry Hunsberger, D.O., on February 10, 2009, with a chief complaint of pain in the right shoulder and right side. Claimant was working light duty at that time. He displayed some crepitants [sic]<sup>1</sup> in the right shoulder and some tenderness on palpation over the latissimus muscle. He was sent for physical therapy for the shoulder and right side. On March 12, 2009, claimant had x-rays of the right shoulder, which revealed good technique and displayed intact bony structures with no evidence of fractures, dislocation, or foreign body. By March 24, 2009, claimant's bilateral shoulder and wrist pain were improved and he was found to be at maximum medical improvement (MMI). He was returned to regular duty without restrictions or permanent impairment.

On November 1, 2010, the ALJ issued an Order For Independent Medical Examination referring claimant for an examination with board certified neurological surgeon Paul S. Stein, M.D. Dr. Stein first examined claimant on December 2, 2010. Claimant presented with multiple complaints in his neck/upper back and shoulders with no specific injury or accident noted. Claimant displayed a limited range of motion in both shoulders, with pain. He had tenderness in the cervical spine and shoulders and two point discrimination in both upper extremities was inconsistent. Dr. Stein suspected symptom magnification or difficulty with communication due to the language barrier, even though an interpreter had been used. He recommended x-rays of claimant's cervical spine and an MRI-Arthrogram of each shoulder. He recommended discontinuation of frequently repetitive work activities with the upper extremities. The February 22, 2011, MRI-Arthrogram of the left shoulder was reported as normal. Claimant refused to proceed with the right shoulder MRI-Arthrogram. Flexion/extension x-rays of the cervical spine were also reported as normal. A followup examination on December 8, 2011, was halted when Dr. Stein determined the translator was inadequate.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist, Pedro A. Murati, M.D., for an examination on May 17, 2011. Claimant's complaints were trouble sleeping; left hand pain and numbness; neck pain with trouble looking down; upper back pain; bilateral shoulder pain; trouble lifting; inability to bend thumb; and trouble cooking and cleaning without hurting.

Claimant reported that his injuries were due to the repetitive nature of his lifting 10 pounds and repetitively reaching and hooking using a knife. Dr. Murati reviewed claimant's medical records and, after examining claimant, diagnosed myofascial pain syndrome in the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, status post left thumb CMCJ fusion and aggravation of the left thumb MCP DJD. He instructed

---

<sup>1</sup> The Board believes Dr. Hunsberger meant crepitus.

claimant to work as tolerated and to use common sense. He opined that his diagnosis, within reasonable medical probability, is a direct result of claimant's work-related injury that occurred April 2009 and January 2010 during claimant's employment with respondent. He went on to assign to claimant a 21 percent whole person impairment (for loss of range of motion to the right shoulder a 5 percent right upper extremity impairment (3 percent whole person); for loss of range of motion of the left shoulder, a 5 percent left upper extremity impairment; for loss of range of motion of the left thumb 42 percent impairment (17 percent left hand impairment, which also converts to a 15 percent left upper extremity impairment); for myofascial pain syndrome affecting the cervical paraspinals a 5 percent whole person impairment; and for myofascial pain syndrome affecting the thoracic paraspinals a 5 percent whole person impairment).

Dr. Murati felt claimant should avoid any activities that involve repetitive grasping or heavy grasping, no use of knives or hooks or anything involving the thumb and no typing, twisting of the upper trunk, awkward position of the neck, use of ladders, climbing, or reaching more than 24 inches away from the body and no lifting more than 35 pounds occasionally, 20 pounds frequently. With these restrictions, claimant was found to have a 100 percent task loss.

Claimant returned to Dr. Stein on March 8, 2012, reporting no new injuries or accidents since the last examination. Claimant reported continued neck, bilateral shoulder and bilateral arm pain with pain down the back. Claimant reported numbness when Dr. Stein touched his neck or shoulders, but none in the extremities. Claimant's examination was notably inconsistent with two Waddell's signs being positive. The sensory examination in the upper extremities was not valid, both during the two point discrimination test and pinprick test. Range of motion testing displayed breakaway weakness with no atrophy appreciated. Dr. Stein expressed concern that the left shoulder MRI-Arthrogram was done because of claimant's lack of motion. The test proved negative, raising concerns about the validity of claimant's complaints.

Dr. Stein was unable to assess claimant's functional impairment due to inconsistent results from the examination and tests. Dr. Stein went on to note that while claimant may have some pain, his examination was so invalid that a determination regarding impairment could not be made.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2008 Supp 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant

to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2008 Supp 44-508(d)(e) states:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2008 Supp 44-508(g) states:

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

Claimant's testimony regarding his alleged accident and the problems associated with his job with respondent is basically uncontradicted. There is no evidence to show he did not experience pain while performing the physical labor required in his job. The parties appeared to stipulate to a January 12, 2009, date of accident at the time of the Regular

Hearing. However, respondent disputes whether claimant actually suffered personal injury by accident on the date alleged. As noted above, accident and personal injury are separately defined in the statute. It is possible to suffer an accident without any resulting injury. That finding explains the ALJ's Award. She appears to acknowledge claimant suffered an accident and perhaps a temporary injury but goes on to deny any resulting permanent impairment. The medical opinion of Dr. Stein supports this position. While claimant worked in a physically demanding job, the results of the physical examinations do not support any permanent impairment. The testing done on claimant creates a multitude of questions regarding credibility. Extremely limited shoulder range of motion results do not coordinate with a normal MRI-Arthrogram. Giveaway weakness and positive Waddell's signs cast doubt on any legitimate permanent limitations. Dr. Stein addressed these concerns in his March 8, 2012, report. He was unable to identify any permanent impairment based upon the very questionable results of the physical examination of claimant. The bottom line is, Dr. Stein simply did not appear to believe claimant's many and contradictory complaints and symptoms. He acknowledged there might actually be some physical limitation but none was probable based upon the inconsistencies.

The Board finds claimant did suffer an accident or series of accidents while working for respondent. But this record fails to support a finding that any permanent impairment resulted from that series of traumatic accidents. Claimant is entitled to the medical treatment furnished by respondent for those temporary aggravations but nothing more. No future medical treatment is proper based upon the lack of physical findings. The ALJ did allow the statutory \$500 in unauthorized medical treatment, if utilized, but that is the extent of any medical treatment beyond that already furnished. The Award of the ALJ is affirmed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed based upon the analysis provided above.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 12, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2013.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
kathleen@sraclaw.com

Carolyn McCarthy, Attorney for Self-Insured Respondent  
cmccarthy@mwklaw.com

Pamela J. Fuller, Administrative Law Judge